

1502TERC

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 In re: TERRORIST ATTACKS ON  
4 SEPTEMBER 11, 2001

03 MDL 1570 (GBD)

Conference

5 New York, N.Y.  
6 May 24, 2018  
10:15 a.m.

7 Before:

8 HON. SARAH NETBURN,

9 Magistrate Judge

10

11 APPEARANCES

12 KREINDLER & KREINDLER  
13 Attorneys for Plaintiffs  
14 BY: JAMES P. KREINDLER  
STEVEN R. POUNIAN  
ANDREW J. MALONEY

15 COZEN O'CONNOR  
16 Attorneys for Plaintiffs  
17 BY: STEPHEN A. COZEN  
SEAN P. CARTER  
J. SCOTT TARBUTTON

18 MOTLEY RICE LLC  
19 Attorneys for Plaintiffs  
20 BY: ROBERT T. HAEFELE  
JODI WESTBROOK FLOWERS

21 ANDERSON KILL P.C.  
22 Attorneys for Plaintiffs  
23 BY: JERRY S. GOLDMAN  
KANISHKA AGARWALA  
ALEXANDER LITT

24 KELLOGG HANSEN TODD FIGEL & FREDERICK PLLC  
25 Attorneys for Saudi Arabia  
BY: MICHAEL K. KELLOGG  
GREGORY G. RAPAWY  
DANIEL V. DORRIS

1502TERC

1 (Case called)

2 THE DEPUTY CLERK: Counsel, please state your names  
3 for the record.4 MR. CARTER: Good morning, your Honor. Sean Carter on  
5 behalf of the PECs.

6 THE COURT: Good morning.

7 MR. POUNIAN: Steven Pounian, also on behalf of the  
8 PECs.9 MR. HAEFELE: Good morning, your Honor. Robert  
10 Haefele on behalf of the PECs.11 MR. COZEN: Good morning, your Honor. Steve Cozen on  
12 behalf of the PECs.13 MR. GOLDMAN: Good morning, your Honor. Jerry Goldman  
14 on behalf of the PECs.15 MR. MALONEY: Good morning, your Honor. Andrew  
16 Maloney on behalf of the PECs.17 MR. KREINDLER: Good morning, your Honor. Jim  
18 Kreindler.19 MS. FLOWERS: Good morning. Jodi Flowers on behalf of  
20 the plaintiffs and the PECs.21 MR. TARBUTTON: Good morning, your Honor. Scott  
22 Tarbutton, of Cozen O'Connor, on behalf of the PECs.23 MR. KELLOGG: Good morning, your Honor. Michael  
24 Kellogg on behalf of Saudi Arabia. With me are my colleagues  
25 Greg Rapawy and Dan Dorris. Mr. Dorris has not yet filed a *pro*

1502TERC

1       *hac vice*, but is going to do so shortly. We also have with us  
2 our Saudi counsel, Abdulaziz al Fahad.

3           THE COURT: Thank you. Welcome, and we will look  
4 forward to your *pro hac vice* application.

5           Let me just reminded everybody to be sensitive to the  
6 court reporter. We have a lot of people in the room. If you  
7 haven't made an appearance and you intend to speak, certainly  
8 introduce yourself.

9           (Discussion off the record between the court and court  
10 reporter)

11           THE COURT: In case you doesn't hear that, because she  
12 not on mike, everyone needs to speak into the microphone. This  
13 courtroom is absolutely glorious but has terrible acoustics, so  
14 please be sure you are speaking into the microphone so that  
15 everybody can hear you.

16           Okay. We are here primarily to check in on the status  
17 of jurisdictional discovery as against the Kingdom of Saudi  
18 Arabia.

19           I have received the parties' May 21 letters, and so I  
20 want to talk about where things stand with respect to that  
21 discovery, give you some preliminary reactions to the disputes  
22 that are at least raised. It appears that the parties don't  
23 contemplate these letters to be their briefs, though I think I  
24 can give you a little bit of guidance to make narrow some of  
25 the disputed issues.

1502TERC

1           In addition, I want to talk about sort of the end  
2 game, as it were, and what the parties are thinking as far as  
3 returning this part of the litigation back to Judge Daniels. I  
4 have some thoughts about that.

5           And then, lastly, I want to speak about the letter  
6 that was filed by the Plaintiffs' Executive Committee on May 23  
7 regarding the requests for short-order forms with respect to  
8 new plaintiffs against Iran and parties that wish to join the  
9 Ashton complaint against Saudi Arabia.

10          I don't know whether or not there are any issues that  
11 the Defendants' Executive Committee wants to be heard on this  
12 particular issue, and I don't believe anybody from the  
13 Defendants' Executive Committee is here, so maybe that issue is  
14 best tabled since they may have a view, but I want to discuss  
15 it at least in part.

16          Why don't I ask Mr. Kellogg to begin by just telling  
17 us where you view things. I know you just returned back from  
18 Saudi Arabia and you have done some investigation, so why don't  
19 you tell me, from your perspective, where things stand and what  
20 you think you can be able to produce and when.

21          MR. KELLOGG: Thank you, your Honor.

22          We just spent a week, a little over a week in Saudi  
23 Arabia. We saw a number of agencies and individuals to begin  
24 the process of gathering documents. So far, what we have been  
25 mainly focused on is understanding where repositories of

1502TERC

1 documents might be held. We are getting, sort of, charts from  
2 the various agencies we talked to.

3 We went to the General Authority on Civil Aviation,  
4 which was the successor of the PCA, which is where Omar Bayoumi  
5 worked for 20 years before he went to the United States and  
6 where he returned to after and recently retired from.

7 We went to the Ministry of Islamic Affairs, where both  
8 Fahad al Thumairy and Khalid al Suwailem, who were the focus of  
9 their document requests, worked.

10 We are in the process, we are going to go back at the  
11 end of the month, after the Ramadan and the post Ramadan  
12 holiday, which complicates our discovery, in order to gather  
13 relevant documents for the court, for the plaintiffs.

14 THE COURT: So your mission in Saudi Arabia was an  
15 investigatory one but not a fact-gathering one or a  
16 document-gathering one? Is that a fair assessment?

17 MR. KELLOGG: Well, we gathered some of the  
18 low-hanging fruit, like the complete personnel file of Omar  
19 Bayoumi. We gathered materials that they had on hand about  
20 Mr. al Thumairy.

21 But really, you know, we have to determine whether  
22 they -- what kind of records they kept in 2000, the e-mail  
23 versus payment records and electronic files and what they might  
24 have in terms of --

25 THE COURT: What can you tell us about that particular

1502TERC

1 issue? Is it an electronic document or is this a paper-heavy  
2 file.

3 MR. KELLOGG: It is pretty clearly not going to be a  
4 lot of electronic stuff, if any. We are talking about 20 years  
5 ago. So far as we could tell, none of the agencies that we  
6 have talked to were using e-mail at that time. Even the  
7 embassies were using faxes and cables back and forth, rather  
8 than electronic media. So we are going to check in detail to  
9 see if there are any electronic files or backup files, but we  
10 don't really expect a volume of that.

11 So mostly what we are dealing with is paper, and Saudi  
12 Arabia is not a heavily papered society. In other words, they  
13 don't document things the way a corporation in the United  
14 States would in 2018. So we are going to have to dig deep to  
15 try to get everything that would be responsive.

16 THE COURT: When we were last here four weeks ago, six  
17 weeks ago, you had a very ambitious schedule.

18 MR. KELLOGG: We did.

19 THE COURT: How do you feel about that schedule now?

20 MR. KELLOGG: I feel chastened about that schedule.  
21 It is a cumbersome process, and of course we need Arabic  
22 speaking individuals with us, not only to do the interviews,  
23 but then to examine documents to decide whether things are  
24 responsive. And we are going to have to collect those and then  
25 bring them back and arrange for translations for our own

1502TERC

1 purposes so we know exactly what is responsive, and then  
2 produce them and turn them over.

3 I think more realistically we are talking about the  
4 end of summer before we can finish substantial document  
5 production, but we intend to do rolling productions along the  
6 way, as we get documents. And much will depend -- and,  
7 frankly, the guidance we are going to need the most from the  
8 court today is the repositories we should be searching. We set  
9 our list of repositories based on Judge Daniels' opinion pages  
10 19 to 23, ones who are mentioned either by Judge Daniels or any  
11 allegations that he cited in that portion of the opinion. They  
12 are the places where the relevant actors worked or visited or  
13 were otherwise involved in. That was the GACA, the General  
14 Authority of Civil Aviation. It was the Ministry of Islamic  
15 Affairs, which plaintiffs claim that a senior official of  
16 theirs charged Thumairy and Bayoumi of aiding the hijackers.  
17 Those are the two main agencies in Saudi Arabia that we have  
18 looked at.

19 In the United States, we have gone to the embassy in  
20 Washington, we have gone to the consulate in Saudi Arabia, and  
21 we have gone to what's called the Saudi Arabia Cultural  
22 Ministry, which is now in Fairfax, Virginia, to look for  
23 educational records there that they might have.

24 So those are the five places that we focused on.  
25 Plaintiffs have suggested 11 additional potential repositories,

1502TERC

1 and I would love to talk about each of those in turn, because  
2 we think it would substantially increase the burden without any  
3 real likelihood of producing responsive documents, particularly  
4 since none of these agencies are dealt with or the allegations  
5 about them are dealt with in pages 19 to 23 of Judge Daniels'  
6 opinion. I can run through those very quickly if they would be  
7 helpful to the court.

8 THE COURT: It may be helpful at a later moment, but I  
9 don't think I need you to do that right now.

10 So I understand what you are contemplating, and I see  
11 in your letter you indicate that you think you will be able to  
12 respond at least in part to, you say, 79 of the 101 requests  
13 for production and 15 of the 18 interrogatories. In stating  
14 that, is it correct to understand that you are going to be  
15 gathering documents from these four or five entities' you  
16 indicate, five entities' you indicate repositories, as you  
17 describe them, and then searching for responsive documents to  
18 those discovery demands? Is that what you are contemplating?

19 MR. KELLOGG: Yes, your Honor.

20 THE COURT: Let me ask you to speak generally about  
21 dates, if you wouldn't mind. I understand that there is large  
22 agreement between the parties about dates, though I also  
23 understand that the plaintiffs are seeking at least some  
24 earlier documents with respect to, I believe, al Bayoumi and,  
25 more generally speaking, documents that post date September 11.

1502TERC

1 MR. KELLOGG: Correct, your Honor.

2 The plaintiffs, in their document requests and  
3 interrogatories, generally set a date range from January 1 of  
4 1998 to 9/11/01, and we had no problem with that, although  
5 Judge Daniels' opinion focused on early 2000. We thought it  
6 was fair that they were asking for some context about the  
7 second move and such of how Bayoumi and al Thumairy ended up at  
8 the King Fahd Mosque and at the L.A. consulate. So we agreed  
9 to those date ranges.

10 A number of them ask for materials even further back,  
11 to 1994, 1995, particularly for al Bayoumi. After our  
12 meet-and-confer, we sent an e-mail saying we would search for  
13 those. I listed the document requests in which they asked for  
14 earlier documents and said we would respond to those.

15 The post-9/11 documents, pose two issues:

16 One, the most what it is asking for, which is like  
17 travel records, compensation, entry and exit visa information,  
18 etc., there is a whole series which we layed out in our letter  
19 of the specific document requests, in our view will not throw  
20 light on what Judge Daniels said was the question, which is,  
21 what happened in early 2000 and whether somebody traveled or  
22 where they traveled and what kind of visas they got and other  
23 such materials don't seem to be particularly relevant. So  
24 that's one set.

25 But they are also asking for any investigations that

1502TERC

1 Saudi Arabia itself performed into the 9/11 attacks as well as  
2 materials shared with the 9/11 Commission and such, and we feel  
3 that those are problematic in a couple of respects. One, to  
4 the extent that they are showing an investigation by what would  
5 be the Presidency of State Security, which includes the entity  
6 that they called the Mabahith, which is responsible, like our  
7 F.B.I., for internal state issues and security issues and  
8 criminal issues. To the extent that they conducted an  
9 investigation, we think that their theories, reactions,  
10 impressions, etc., are not properly within the scope of what  
11 Judge Daniels has requested. They are also, under Saudi law,  
12 classified and potentially, to the extent that we were sharing  
13 materials with the F.B.I. or with the 9/11 Commission, it was  
14 the understanding of both parties that the materials shared  
15 back and forth were to be confidential.

16 So to the extent the -- the 9/11 Commission has  
17 produced, I believe, a tremendous amount of material, posted it  
18 on the Web. To the extent that they have withheld certain  
19 materials, we don't think it is appropriate for the plaintiffs  
20 to come and try to get it sort of through the back door through  
21 us, and that it would be inconsistent with our agreements with  
22 the U.S. investigators.

23 THE COURT: Let me ask you a question with respect to  
24 the dates. If this were a less charged court action you could  
25 envision communications and documents that post date the

1502TERC

1 accident as being relevant and probative because it might  
2 indicate state of mind, knowledge, oh my gosh, I can't believe  
3 this Cuisinart actually exploded in the kitchen. We thought it  
4 might those kind of *post hoc* communications by people with  
5 knowledge that would be discoverable in an ordinary tort case.

6 And so my reaction generally to the date range issue  
7 is that it doesn't seem reasonable to make 9/11 the cutoff  
8 date, at least for all matters, because to the extent there are  
9 relevant communications -- let's get Bayoumi and al Thumairy  
10 out of the country quickly because of what they just  
11 orchestrated, for example -- that they should be entitled to  
12 those documents. So I see that as different than the category  
13 of documents that were either an internal investigation that  
14 the Kingdom conducted or documents that were provided to  
15 various intelligence agencies, including the F.B.I. or the CIA  
16 or the 9/11 Commission.

17 But generally speaking, if you are searching for  
18 communications between or about these two individuals, let's  
19 say that the Ministry of Islamic Affairs might have, it seems  
20 to me that there should be some dates, some searching,  
21 postdating 9/11.

22 MR. KELLOGG: Understood, your Honor.

23 You know, this is not an ordinary 26(b)(1) case, and  
24 Judge Daniels did focus very much on whether instructions were  
25 given at a specific time and communications regarding those,

1502TERC

1 and we think the most relevant materials are contemporaneous  
2 documents. If the court wants us -- as I said, most of what  
3 they are asking for post 9/11 falls into two categories. One  
4 category is just the same stuff they were looking for pre-9/11  
5 of communications with Thumairy, communications with Bayoumi,  
6 travel information, exit visa information. We could gather  
7 that. Of course we don't think it is within the scope, but we  
8 could gather that in the ordinary course. We have a bigger  
9 concern with investigative and intelligence materials which  
10 they also request.

11 THE COURT: Okay. I am going to come back to you, but  
12 let me turn to the plaintiffs for a minute.

13 Mr. Carter, you are in the hot seat, so I assume you  
14 will be taking the lead here.

15 MR. CARTER: I am, your Honor. I will kick us off and  
16 Mr. Pounian may very well have some things to add on certain  
17 subjects.

18 THE COURT: Okay.

19 So you heard from Mr. Kellogg that you will be  
20 receiving documents from at least these five repositories. I  
21 think you heard me that I am inclined to order that we go past  
22 9/11 as a cutoff for searching ordinary internal  
23 communications, e-mails, memos, etc. Talk to me about -- why  
24 don't I tell you what I am thinking about, and then maybe you  
25 can tell me what you think.

1502TERC

1 MR. CARTER: Sure.

2 THE COURT: Judge Daniels identified very specific,  
3 tailored allegations that the plaintiffs have put forward  
4 establishing the jurisdiction over Saudi Arabia. I had  
5 reviewed your discovery demands, and I think they are, in large  
6 measure, beyond the scope of what he has authorized. It may be  
7 that ultimately the court's conclusion is that the case should  
8 go forward with the merits discovery, in which case the types  
9 of demands that you are seeking may in fact be appropriate, but  
10 at this stage I do think they are beyond what is contemplated  
11 by his decision or what I contemplated when we were together in  
12 April.

13 What I am contemplating right now is that you obtain  
14 as quickly as possible -- and Mr. Kellogg says the end of the  
15 summer, but I'm hoping we can move that date up some -- and  
16 that you review those documents and see what you learn before  
17 you make an application to compel the response to any number of  
18 discovery demands that you have propounded at this point, given  
19 that my sense, since it wasn't in the complaint or the  
20 decision, is that those paths of discovery are ones that you  
21 think may be lucrative, but don't have a firm foundation for  
22 pursuing, and that the better course may be for you to see  
23 what you learn, and if there is something in the batch that I  
24 think we can all agree is an appropriate batch of discovery,  
25 you can then make an application to the court to compel

1502TERC

1 responses.

2 MR. CARTER: Your Honor, we had a slightly different  
3 approach in mind, although the one your Honor has proposed may  
4 very well work.5 Our view on this was that the principal issue,  
6 overarching issue at this point is how is Saudi Arabia going to  
7 go about collecting documents and information? And your Honor  
8 had mentioned that Mr. Kellogg had referenced searching and  
9 producing documents from five repositories. In fact, what we  
10 have is an agreement on their part to search through five  
11 repositories, three of which may be subject to very broad  
12 assertions of privilege under the two Vienna Conventions,  
13 pursuant to which the Kingdom has said it is not permitting  
14 providing any of the documents or the information learned and  
15 that it may not even be willing to provide a privilege log.16 Our view, in terms of how this should proceed, is  
17 relatively simple. The Supreme Court held in its *Republic of*  
18 *Argentina v. NML Capital* decision that where discovery is  
19 proceeding under the FSIA, the normal rules of discovery under  
20 the federal rules apply to the discovery that has been  
21 authorized. From that flow a couple of very simple, basic  
22 principles, in our view.23 First, under Rule 34, a party who is engaged in  
24 discovery has an obligation to produce documents in its care,  
25 custody, and control if they are relevant and unless they are

1502TERC

1 privileged. So we think application of that basic rule here is  
2 appropriate, that the Kingdom should be obligated to do what  
3 any litigant in federal court subject to discovery would be  
4 obligated to do consistent with the Supreme Court's holding and  
5 look in the places where the documents are located.

6 Now, we have asked a very simple interrogatory on that  
7 front that asked the Kingdom to identify repositories where  
8 documents related to Bayoumi and Thumairy are located. We  
9 believe that they already have that information. So we think  
10 it is all the more important that they have a search that  
11 captures all of the repositories, given the way that they have  
12 articulated their privileges. We may not be getting anything  
13 from three of the places they are talking about searching; and,  
14 to the extent documents from those places were sent, for  
15 instance, to the Foreign Ministry or somewhere else, the  
16 privilege that attached to archives and consular or diplomatic  
17 properties may have been waived. So that's the first  
18 principle.

19 The second is simply, with regard to the  
20 interrogatories --

21 THE COURT: I want to interrupt you so I understand.  
22 So you think that, in response to that interrogatory, the  
23 kingdom would respond that documents related to these two  
24 individuals would be located in repositories outside of the six  
25 that they have agreed to search.

1502TERC

1                   MR. CARTER: I think we are relatively certain that  
2 that would be the case from what we know. We have identified  
3 in our letter certain contacts that occurred with other  
4 ministries. We know that senior people from the Ministry of  
5 Defense and Aviation, which is the parent of now the GACA, what  
6 was the Presidency of Civil Aviation were involved in Bayoumi's  
7 secondment, and so it stands to reason that there may very well  
8 be documents in the parent ministry that aren't resident in the  
9 Presidency of Civil Aviation. And, again, this is simply a  
10 matter of adhering to the normal approach under the rules as to  
11 the scope of a document collection effort. We think that they  
12 likely already know where all of the documents are and can  
13 provide them to us.

14                   THE COURT: What you are saying now I think is  
15 slightly different than what you propounded in your discovery  
16 demand, which was unusual. If you believe there is a clear  
17 chain of litigation that you can point to about particular  
18 secondment that had to go to the Ministry of Finance or some  
19 other agency for approval or for signoff, or for whatever it  
20 is, it seems to me that that can be a very tailored discovery  
21 demand.

22                   But I think, generally speaking, the broad discovery  
23 demands that you have propounded and saying look at every  
24 agency that could ever have any possible touch to the 9/11  
25 attacks is overbroad and is not what was contemplated by

1502TERC

1 Judge Daniels.

2 So I hear you that you are saying we have very strong  
3 reason to believe that this particular memo had to go to this  
4 particular agency in order for Bayoumi's secondment to happen,  
5 for example. That seems different to me than saying the  
6 Kingdom needs to search its entire filing system to search for  
7 a needle in a haystack.8 MR. CARTER: Well, your Honor, just take, for example,  
9 our request that The kingdom search the Mabahith. Mr. Kellogg  
10 had suggested today that it is an intelligence agency, the  
11 equivalent the F.B.I., and therefore everything categorically  
12 that might come out of it would be privileged in their view.  
13 Our view that in the course of the Kingdom's own  
14 investigations, certain original documents would have all  
15 gotten transported over there and that this is one-stop  
16 shopping for most virtually everything that we are entitled to  
17 and would want. There may very well be assessments, analyses  
18 that occurred after 9/11 that would validly be privileged. But  
19 with respect to the stuff that was identified and collected for  
20 purposes of determining specifically what Bayoumi and Thumairy  
21 were doing, who may have been directing them, that is an  
22 appropriate place for them to be searching and it really -- the  
23 exercise that they have gone through previously is the one that  
24 the federal rules contemplates, to look around, gather the  
25 documents, gather the information, and put it in a central

1502TERC

1 place. And to the extent that's already been done, we think  
2 that that's the first place that the Kingdom should begin  
3 searching, especially given the potential that the other  
4 repositories are going to essentially be or potentially be  
5 regarded by the Kingdom to be off limits.

6 And so we are happy to make a showing, your Honor, as  
7 to why we think particular repositories should be searched at  
8 the outset of this. We obviously could not have canvased those  
9 issues, as your Honor surmised, in a ten-page letter brief on  
10 the status. And so we are happy to do that up front and  
11 explain legally our position about how the federal rules should  
12 operate in the context of this and why we think these are  
13 appropriate places for them to be looking.

14 THE COURT: Mr. Kellogg, if it is correct that this  
15 agency -- what's the name of the agency you describe as like  
16 our F.B.I.

17 MR. CARTER: It's the Mabahith.

18 MR. KELLOGG: No. It is the Presidency of State  
19 Security, your Honor. There are only two agencies. There is  
20 the Presidency of State Securities, which is the equivalent of  
21 the F.B.I., and what Mr. Carter calls the Mabahith is contained  
22 within that. There is also the GID, General Intelligence  
23 Directive, which is their equivalent of the CIA, and Mukhabarat  
24 is contained -- what they are what they are calling Mukhabarat  
25 is contained within that.

1502TERC

1                   THE COURT: If there were documents that the  
2 Presidency of State Security gathered from various other  
3 agencies, Islamic Affairs, etc., agencies that you have said we  
4 are prepared to search, if it is true that, following the  
5 September 11 attacks, this particular agency, this intelligence  
6 agency went around to the various agencies that it thought  
7 might have information and physically grabbed paper documents  
8 for the purposes of its investigation, originals, faxes from  
9 the year 2000, grabbed them for purposes of its own  
10 investigation, would it be your position that those documents  
11 would be otherwise off limits because they were part of the  
12 documents that you were using for investigation or would you be  
13 prepared to search that collection, which has already been  
14 gathered, without necessarily even revealing whether they were  
15 part of the investigation gathering or not, but simply as an  
16 original document that would be responsive to the discovery  
17 demands?

18                   MR. KELLOGG: Absolutely, your Honor. In fact, we  
19 have begun that process. We had a lengthy meeting with  
20 Presidency of State Security. We think the plaintiffs'  
21 assumption that a large investigation was done and materials  
22 were gathered is mistaken; but, to the extent that any  
23 materials were gathered, original materials from the various  
24 agencies we are searching or otherwise, we would be prepared to  
25 work with the Presidency of State Security to turn those over.

1502TERC

1                   THE COURT: So you are prepared, you identified five  
2 repositories, but I think I hear you saying you are prepared to  
3 also review that collection of material, which I am  
4 interpreting as different than that agency's own investigative  
5 files, its own original work that it is creating, but you would  
6 search the file cabinet, as it were, of documents that it  
7 seized from other agencies and that it reviewed as part of its  
8 own internal investigation.

9                   MR. KELLOGG: Correct, your Honor. To the extent  
10 that, say, PSS received documents from the Ministry of Islamic  
11 Affairs or from GACA, and those files are no longer with those  
12 agencies because they took the originals, then absolutely we  
13 believe we should turn those over.

14                   THE COURT: Okay. And would you commit to turning  
15 over any responsive document that is in that intelligence  
16 gathering set of documents, even if it is not from the five  
17 repositories that you identified? So let's say some other  
18 ministry, the Ministry of Finance, also had relevant documents  
19 that, when the Presidency of State Security opened its own  
20 internal investigation, for whatever reason, its catchment of  
21 documents was broader, it brought everything under its own  
22 house and then now, in reviewing those documents, if you see  
23 documents that are responsive to the discovery demands, but  
24 maybe don't come from those five identified repositories, do  
25 you commit to turning that over as well?

1502TERC

1                   MR. KELLOGG: Yes, your Honor, subject -- it's a  
2 hypothetical because, based on our discussions with them, we  
3 think their role was mainly cooperating with the United States  
4 and supporting the United States's investigation, rather than  
5 doing any extensive investigation of their own. But to the  
6 extent that they gathered responsive documents from the  
7 relevant periods, then we would commit to searching for those  
8 documents.

9                   THE COURT: Okay.

10                  MR. KELLOGG: Subject to any kind of, you know --  
11 there may be some sources and methods issues that come up that  
12 require redaction or otherwise, but we do anticipate doing  
13 that.

14                  And with respect to the diplomatic documents, we  
15 talked about the embassy, we talked about the consulate. We  
16 met personally with the Minister of Foreign Affairs, and he  
17 made it quite clear that they are prepared to turn over  
18 relevant documents. They don't want, you know, a general  
19 rummaging in their diplomatic files, but the sort of targeted,  
20 focused gathering of documents we do not anticipate -- this  
21 could change, I'm saying based on our discussions, we do not  
22 anticipate that they will be claiming diplomatic privilege for  
23 those.

24                  THE COURT: Okay.

25                  MR. KELLOGG: But we did have to, in the letter,

1502TERC

1 preserve all our rights and privileges, otherwise they would  
2 say we waived them.

3 THE COURT: Understood. Thank you.

4 Mr. Carter, I was with you, but I wanted to get some  
5 clarity. So now we have a little bit, I think, better sense.

6 So not only is the Kingdom committing to search these  
7 five repositories independently, it is also committing to doing  
8 exactly what you wanted, which is, in the weeks and months  
9 after 9/11, to the extent Saudi Arabia conducted its own  
10 investigation, either for its internal purposes or for purposes  
11 of cooperating with any foreign agency, and it is holding those  
12 documents in a particular place, that it will also search those  
13 documents.

14 So if they lifted a personnel file from where it  
15 should be and brought it into this intelligence agency, it  
16 would not be protected, and they would search for it and  
17 produce it unless there was some other independent ground, but  
18 the fact that it was housed in the intelligence agency  
19 wouldn't, in and of itself, make it nondiscoverable.

20 MR. CARTER: That's what I understood as well, your  
21 Honor.

22 THE COURT: Okay.

23 MR. CARTER: There obviously are, as your Honor  
24 alluded, some very specific cases with regard to the approval  
25 of Bayoumi's secondment, for instance, with regard to certain

1502TERC

1 financial transfers where we have a very specific reason for a  
2 very specific issue that we believe a particular ministry would  
3 have a document and we would like to have an opportunity to  
4 make that showing with respect to those entities.

5 THE COURT: Do you believe that the discovery demands  
6 that you already served are narrow and targeted in that  
7 particular way or are they broad in your mind and would capture  
8 the specific thing you are seeking but you wanted whatever else  
9 would come along as well?

10 MR. CARTER: I think that they likely would have --  
11 some of them would have to be clarified in a way that says:  
12 With respect to this particular request, we are asking  
13 specifically for this ministry because we have the following  
14 information to suggest that there are documents there.

15 THE COURT: Okay. I think that that would be a  
16 helpful thing. So you can review discovery demands. If there  
17 is something outside of what we have been discussing here,  
18 maybe something from, I'm going to keep using the Ministry of  
19 Finance, that you have a particular reason to believe is going  
20 to be relevant to explain that, so that we can have a targeted  
21 search and so they can respond more specifically to what the  
22 request is.

23 MR. CARTER: Thank you, your Honor.

24 We also do believe that the General Intelligence  
25 Directorate is the repository that would house documents

1502TERC

1 relating to the activities of Thumairy and Bayoumi that are  
2 described in the court's March 28 decision; and, in fact, we  
3 put affidavits in the record that the intelligence agency would  
4 have been a secondary customer of the activities that Bayoumi  
5 and Thumairy were engaged in, and so we have evidence as well  
6 that Thumairy was in fact involved in supervising people who  
7 were engaged in intelligence-gathering activities, and so it  
8 naturally follows that there would have been reporting to that  
9 agency relating to what Bayoumi and Thumairy are doing.

10 The Kingdom's response to that is to say, That's our  
11 CIA, and therefore everything that could possibly come out of  
12 that would be a state secret. That kind of blanket assertion  
13 of a privilege based on state secrets doesn't comport with the  
14 federal rules and it is not even something that the CIA or  
15 F.B.I. could do if they were litigating a discovery dispute in  
16 U.S. courts. There is a very specific showing. They have to  
17 come forth. They can't simply say, We are an intelligence  
18 agency, so anything in our files necessarily becomes a state  
19 secret. Actually they have to bring forward the head of the  
20 agency to personally invoke the privilege, to say that he or  
21 she has given it personal consideration, and that it is  
22 necessary to hold the documents back. So the mere fact that we  
23 are talking about an intelligence agency doesn't foreclose the  
24 possibility that there are documents there that we are entitled  
25 to. We candidly question whether or not the states secret

1502TERC

1 privilege is available to Saudi Arabia in these proceedings.  
2 What we would simply like to do is to ensure that that  
3 repository is searched.

4 When we spoke on the phone with Mr. Kellogg, we asked  
5 specifically, with regard to your common law privileges, state  
6 secret deliberative process, would you provide a privilege log,  
7 and the answer at that time was yes. So that's all we are  
8 expecting here. If they have valid assertions of privilege,  
9 they will provide us with a privilege log, and we can go  
10 forward from there. But we do believe that there are documents  
11 in that repository that are highly relevant here.

12 THE COURT: Mr. Kellogg, have you spoken with the  
13 folks from the General Directorate?

14 MR. KELLOGG: We have not spoken with anyone from the  
15 General Intelligence Directorate, your Honor, nor do we think  
16 that plaintiffs have made even remotely a showing that that  
17 agency is likely to have relevant documents that have anything  
18 to do with the allegations within pages 19 to 23 of Judge  
19 Daniels' opinion. The only thing they cite in their letter as  
20 a basis for a broad search of effectively the CIA is that they  
21 say that the F.B.I. had, quote, strong suspicions that Bayoumi  
22 was a Mukhabarat agent. In fact, the F.B.I. expressly rejected  
23 that in their 2005 joint report with the CIA. And plaintiffs  
24 did not argue in the recent round of pleadings that Bayoumi was  
25 an intelligence agent, and Judge Daniels did not rely on any

1502TERC

1 such allegation. So there is, accordingly, no basis, no basis  
2 under Judge Daniels' opinion to do a search of the GID,  
3 particularly given all the sensitivities to a foreign sovereign  
4 and their intelligence agency. The CIA would never allow a  
5 foreign government to search into its files or prepare  
6 privilege logs after doing so, and we are really not in a  
7 position to go to the GID and say, We want to take a look  
8 through your files.

9 THE COURT: Okay.

10 MR. POUNIAN: Your Honor, may I be heard on one thing?  
11 Mr. Kellogg said there was no evidence in the record about  
12 Mr. Bayoumi being an intelligence agent. On the motion record,  
13 we submitted an affidavit from the head of the PENTTBOM  
14 investigation, the official 9/11 investigation, who was the  
15 head of the team in Los Angeles, and he said that they found  
16 substantial evidence that Mr. Bayoumi was a Saudi intelligence  
17 agent. So that is something that is in the record, that was in  
18 the record before the court, and is an allegation that we have  
19 made with the court, and I just wanted to correct that  
20 statement.

21 THE COURT: What I was proposing, and this is a good  
22 example of my concern, is given the sensitivity to this agency  
23 and the likelihood that a lot of information is appropriately  
24 protected by privilege, it seems to me that the better course  
25 here is for you to get the underlying documents relating to

1502TERC

1 al Bayoumi, the types of communications that were going on; and  
2 to the extent there is something in that record, some actual  
3 evidence, contemporaneous evidence that you could then bring  
4 back to the court and say, Look, here is communication, here is  
5 a memo, here is some specific document. But the fact that the  
6 9/11 Commission or some agent said that, We had suspicions or  
7 we thought this or we made this conclusion, that's not  
8 evidence. So it seems to me that you should have access to the  
9 types of documents that would be able to help the court draw  
10 that conclusion. I can't rely on the conclusion of others.

11 MR. POUNIAN: I understand that. I understand what  
12 you are saying, your Honor, but they have to assert the  
13 privilege in a certain way. They have to say where they have  
14 the documents, and we are entitled to investigate this. And  
15 under JASTA, we are supposed to be allowed full access for this  
16 type of discovery. The JASTA action is specifically geared to  
17 this type of activity occurring by a foreign state taking this  
18 action in the United States. We are kind of blazing a new  
19 trail here for the first time, your Honor, in this  
20 circumstance, and I think that it is a critical issue. If the  
21 foreign government is sending an agent here who is authorized  
22 to provide a support network for al Qaeda inside the United  
23 States, that is something I think this court is entitled to  
24 allow discovery on.

25 THE COURT: But that's just your argument. The Saudi

1502TERC

1 government isn't saying that --

2 MR. POUNIAN: I understand. But we have presented  
3 proof -- it is argument, your Honor, but we have presented  
4 proof from the PENTTBOM investigation that they did assemble  
5 evidence of this. You know, we are not -- we don't have access  
6 to all of those details, but we have presented evidence in the  
7 motion record regarding that.

8 THE COURT: Okay.

9 MR. CARTER: Your Honor, could I make a practical  
10 suggestion on this point?

11 THE COURT: Sure.

12 MR. CARTER: We don't really see any problem simply  
13 having Mr. Kellogg ask the General Intelligence Directorate  
14 whether it has documents relating to Bayoumi and Thumairy  
15 dating to the period '98 through 2001, and we will get an  
16 answer to that question. I'm sure they have the capabilities  
17 of simply saying yes or no. I'm sure they know the people they  
18 have documents about. And once we know whether or not the  
19 documents exist, which is the point of the interrogatory we  
20 asked, we can take the next step to see whether or not it makes  
21 sense to go down that road.22 THE COURT: My guess -- I'm happy to hear Mr. Kellogg  
23 clog before I predict what he is going to say. Mr. Kellogg,  
24 are you planning to answer this interrogatory?

25 MR. KELLOGG: I'm sorry your Honor?

1502TERC

1                   THE COURT: Are you planning on answering this  
2 interrogatory?

3                   MR. KELLOGG: We are planning on answering the  
4 interrogatories.

5                   THE COURT: The specific interrogatory as to whether  
6 or not --

7                   MR. KELLOGG: Just --

8                   THE COURT: -- whether or not --

9                   MR. KELLOGG: About repositories, we are going to  
10 answer them based on the places we have undertaken to search.

11                  THE COURT: I think what Mr. Carter is proposing is  
12 that you answer an interrogatory as to whether or not the  
13 General Intelligence Directorate has documents related  
14 to al Bayoumi or whether he was an agent of that agency.

15                  MR. KELLOGG: And our suggestion is that they haven't  
16 made a proper showing that would justify that sort of inquiry  
17 into the intelligence agency of a foreign sovereign. The  
18 evidence that they are referring to is speculation that when  
19 Bayoumi went to the L.A. consulate allegedly to get his  
20 passport renewed, he was in fact engaging in spycraft to  
21 disguise the fact that he was an intelligence agent. That is  
22 not evidence. It is not a sufficient basis. Judge Daniels did  
23 not rely upon it in 19 to 23, and I think it would be a  
24 significant affront to a foreign government. Certainly the CIA  
25 would not answer such a question. They always refuse to

1502TERC

1 confirm or deny, because denial means -- implies confirmation  
2 when they don't deny. So I think it would put us in a very  
3 awkward position, your Honor, and I think that they haven't  
4 made a sufficient showing to request that.

5 THE COURT: Okay.

6 MR. CARTER: Your Honor, on that point, I think  
7 simply, if that's the Kingdom's position, that they can't be  
8 obligated to look or do something, that statement needs to come  
9 from an official of the Kingdom, as opposed to just a  
10 representation by counsel. That is the way it would work if  
11 the CIA were in a discovery proceeding and were telling the  
12 court, We can't tell you this, because it would itself  
13 implicate a state secret, the head of the agency would come  
14 forward, invoke the privilege, say that he or she has given it  
15 personal consideration, and it would flow under the rules that  
16 apply to asserting that privilege. It is a relatively straight  
17 forward question.

18 THE COURT: Okay.

19 Mr. Kellogg, I want you to do better than the end of  
20 summer for this what I'm going to call a first tranche of  
21 production. I would like to get these documents to the  
22 plaintiffs by July 31. That gives you a little over two  
23 months, which I think should be enough time.

24 MR. KELLOGG: And as I said, we will do rolling  
25 production. We have personnel files already, and we just want

1502TERC

1 to make sure that they are complete, and we will endeavor to  
2 do, and I would love to have it done by July 31, your Honor.

3 It is just logically, there are some issues, but we will do  
4 our best.

5 THE COURT: Okay. And where appropriate, I want you  
6 to look through December 31, 2002. So that gives us a little  
7 bit over a year past 9/11. And I want you to look through the  
8 repositories that you have agreed to look through as well as  
9 the Presidency of State Security file, to the extent that they  
10 assembled documents for their purposes whether for their own  
11 internal investigation or for purposes of sharing information  
12 with other intelligence agencies.

13 I am not going to direct that you respond to the  
14 interrogatory or search the General Intelligence Directorate,  
15 but that is a ruling without prejudice. I want you,  
16 Mr. Carter, and your colleagues to look through the documents  
17 you that receive, and then we are going to set up an  
18 opportunity for proper motion practice, where you can put  
19 forward to me what documents you believe you are now further  
20 entitled to in light of the first tranche of production. But  
21 what I want you to get is sort of the core documents that we  
22 are talking about here, so everything related to these two  
23 individuals' employment, the secondment, their communications  
24 with the various consulates, their sort of role with the  
25 various -- with the aviation agency. Obviously you are getting

1502TERC

1 whatever you are getting from Dallah Avco. I am pretty sure I  
2 have a pending motion to compel on that front, so maybe you  
3 don't have that much from them, but I want to do this in a  
4 tranched and phased way, because I think we will have a better  
5 sense of what is there, and it may be that the discovery  
6 indicates that there really is a good-faith basis to expand  
7 much more broadly the scope of discovery.

8 So, Mr. Kellogg, you should advise your client that is  
9 this is not the end of it, this is our first phase, and then we  
10 will see what we have.

11 I think we should have, and I'm going to leave it to  
12 the parties to agree on exactly what it looks like, but a  
13 privilege log should be produced. I don't have a sense yet,  
14 given the agencies that we are looking at, what privilege is  
15 going to be asserted and whether or not it is the type of thing  
16 where we can do categories. So, in the first instance, I'm  
17 going to look to the parties to try and coordinate and  
18 cooperate on that front. If there are categories that give the  
19 plaintiffs adequate understanding of what is actually  
20 encompassed in those categories, that may be sufficient for  
21 purposes of asserting a privilege, but obviously your  
22 categories have to be meaningful, meaning they can't just be,  
23 Privileged documents are in this category, and we are asserting  
24 a privilege.

25 So let's do that. It's going to be a rolling

1502TERC

1 production on July 31.

2 I think, then, what I would like to do is give the  
3 parties an opportunity to have a review of the documents and a  
4 meet-and-confer and then see whether or not you can resolve any  
5 of those disputes on your own and agree to expand or search for  
6 additional discovery.

7 Let me just pause for one moment.

8 Mr. Kellogg, in addition to the general discovery  
9 demands, the plaintiffs are going to give you more targeted  
10 discovery which may be slightly beyond what I am directing  
11 today, so it might be a different agency, but it should be  
12 targeted.

13 And, Mr. Carter, you should be candid and clear about  
14 what it is you are seeking and why, to give Mr. Kellogg and his  
15 team as much information to do as meaningful a search as  
16 possible.

17 MR. CARTER: Sure, your Honor.

18 THE COURT: I am thinking that mid September would be  
19 an adequate amount of time for you to receive these  
20 documents -- I don't know if we are going to have translation  
21 issues, which is going to cause complications. Obviously there  
22 is going to be translation done in the first instance. Are the  
23 parties agreeing to share translators? Is that something that  
24 we can do?

25 MR. CARTER: Your Honor, there was provision in, I

1502TERC

1 believe, the case management order number two, going back to  
2 2003, that essentially required the parties to share existing  
3 translations of documents, but not share translations that were  
4 done during the course of the litigation, for purposes of the  
5 litigation.

6 THE COURT: Can we revisit that topic? Is it  
7 possible? Look. If Mr. Kellogg and his team are getting a  
8 bunch of documents in Arabic, they are then hiring a translator  
9 to translate them so that they can do a review and determine  
10 whether they are responsive or privileged, then to turn over  
11 the Arabic versions, and for you to then hire your own  
12 interpreter seems problematic. It delays the process, it is  
13 more expensive, and I would hate for there to be sort of a  
14 battle of the interpreters, as well.

15 Is it possible that the parties could agree on a  
16 neutral interpreter who could review this? And now that I am  
17 thinking out loud, there are going to be issues, I assume,  
18 about privilege that you may have problems with.

19 MR. KELLOGG: Well, there are, your Honor. And,  
20 frankly, we were planning to do initially a fairly quick and  
21 dirty and perhaps even machine translation in order for us to  
22 determine whether the documents are generally responsive,  
23 whether there is a privilege issue as well, and there will  
24 probably be only a subset down the road that we get a certified  
25 translator to do. And there will inevitably translation

1502TERC

1 issues, where dueling translators say, no, this means X, Y, and  
2 Z and somebody else says, no, it means A, B, and C. I suspect  
3 it won't be possible for us to come to an agreement on that.

4 THE COURT: Do you intend to produce your translated  
5 version along with your --

6 MR. KELLOGG: No, your Honor.

7 THE COURT: -- Arabic version?

8 MR. KELLOGG: No. We just plan to produce the Arabic  
9 version.

10 THE COURT: So is it possible that we are going to  
11 have motion practice, whenever we have it, where I have dueling  
12 English versions of the same document?

13 MR. KELLOGG: My understanding is, your Honor -- I  
14 have never done a case like this before, but my understanding  
15 is that there are dueling translators even in depositions who  
16 argue over whether the, you know, question has been interpreted  
17 properly to the deponents and whether the deponent's answer has  
18 been interpreted properly back. I am afraid it is something of  
19 a mess that can't be avoided.

20 THE COURT: Okay. Let's just pause on the idea that  
21 we can try to avoid it and maybe you can speak. It seems to me  
22 that there could be, in theory, an agreement that the ABC  
23 Corporation, which does excellent translation for high-level  
24 corporations and government agencies, could be the translation  
25 company that both sides agree to, and that you agree to use the

1502TERC

1 same company for depositions, for document translations. It  
2 seems to me that rather than have this, at least in the first  
3 instance, rather than create an unnecessary dispute, to say  
4 nothing about time delays and costs, that this might be a way  
5 to move the case along. And it could be without prejudice to  
6 each side at a later date saying we are actually challenging  
7 the designated interpreter because we have taken this  
8 particularly important document to another interpreter, and  
9 that interpreter says it is something else. But for your  
10 ordinary course of documents, where there is not going to be a  
11 whole lot of dispute about what is being reported, it seems to  
12 me you can save a lot of heartache by sharing interpreters.

13 MR. KELLOGG: I am happy to discuss that with  
14 Mr. Carter, subject to the caveat you mentioned, which is,  
15 either side is free to dispute the agreed-upon translation.

16 THE COURT: I would never let a lawyer not make an  
17 argument.

18 MR. CARTER: I am happy to speak with Mr. Kellogg and  
19 the cast of characters on our side as well.

20 THE COURT: I think you should.

21 MR. CARTER: Sure.

22 THE COURT: I have to believe that there must be some  
23 agency that we could agree upon would be adequate for this  
24 purpose, and that way you can share costs. And then when  
25 Mr. Kellogg's team is translating a document for purposes of

1502TERC

1 discovery, you can get the translation because it is the one  
2 that we all agreed upon. And, again, you would be free to  
3 dispute even the translator that was agreed upon, but then we  
4 don't have to delay another month to have all these documents  
5 translated.

6 So I am going to throw that out there to you all, but  
7 I think it is something you should seriously consider.

8 So I want documents produced on a rolling basis on the  
9 documents we have agreed upon with the dates that we have been  
10 discussing. Final production should be July 31.

11 There should be some form of privilege log to the  
12 extent you are withholding documents on the basis of privilege.  
13 In the first instance, I'm going to leave it to the parties to  
14 try to work out an agreement. Again, maybe there are no  
15 documents that are privileged. Maybe it is so large that  
16 categories are appropriate. So, without any more information,  
17 I'm going to hold off on a direction on that particular front.

18 MR. KELLOGG: Just as a clarification, your Honor. My  
19 understanding is your ruling with respect to the PSS, we are  
20 going to look for documents that they gathered from other  
21 places and brought together, and I don't have to put a  
22 privilege log of any of their impressions or notes or such,  
23 like, investigative materials. It's in order to get documents  
24 that say the Ministry of Islamic Affairs had --

25 THE COURT: Correct.

1502TERC

1 MR. KELLOGG: And then I don't anticipate a problem.

2 THE COURT: Correct. That's correct. Okay.

3 Then what I want is for you all to spend the next 45  
4 days reviewing those documents for the Plaintiffs' Executive  
5 Committee to determine whether or not, based on that  
6 production, you believe that they need to go back either into  
7 the same repositories or whether they need to expand their  
8 searches, whether there is targeted discovery that you think  
9 you can identify a particular memo, for instance, that's  
10 referenced, or whether or not you think the discovery  
11 demonstrates that we should have a larger production, sort of  
12 more akin to the types of discovery demands that you initially  
13 propounded.

14 I want the parties to have a meet-and-confer on that  
15 issue, and then I think probably, rather than have a status  
16 letter, we should just set a deadline for motion to compel. I  
17 think that's probably the most efficient process. I don't have  
18 a calendar here. I will look at the calendar. But it will be  
19 a mid September deadline for the motion to compel. So we will  
20 set an order for that, and it will be the plaintiffs' motion to  
21 compel responses or additional discovery, and your motion will  
22 be most successful if you can provide me with the types of  
23 evidence that justifies further inquiry.

24 I want to talk about the Kingdom's request for  
25 discovery from the plaintiffs. My reaction to that is that it

1502TERC

1 is not appropriate, but I am sensitive to the concern that you  
2 raised about a potential sandbag. So I want to talk for one  
3 moment -- I don't know if people have started thinking about  
4 this -- about the end game here, which is how we are going to  
5 go back to Judge Daniels.

6 I think what Judge Daniels anticipates is a renewed  
7 motion to dismiss filed by the Kingdom. What I want to propose  
8 is that the plaintiffs -- I'm not ready to order this, but here  
9 is what I am thinking might make sense -- that the plaintiffs  
10 set forth something like findings of fact in advance of the  
11 motion to dismiss, setting forth the basis that the Plaintiffs  
12 Executive -- I don't want an amended complaint -- nobody wants  
13 an amended complaint -- but a statement on this particular  
14 issue, say, findings of fact à la Rule 56.1, although that's  
15 not what we are talking about here, so some version of that, so  
16 a statement with supporting documents that the Kingdom can  
17 review and rely upon in making its motion.

18 In theory, how does something like that sound?

19 MR. CARTER: Your Honor, in theory it sounds fine. We  
20 have actually done something similar in the context of some of  
21 the personal jurisdiction motions that occurred earlier in the  
22 case and came forward after discovery with affirmations of  
23 facts in evidence that we were going to rely upon in support of  
24 our opposition to those motions. I think we have to talk about  
25 the timing of all of that; but, in theory, I don't think it is

1502TERC

1 a problem. We are not trying to play hide the ball. We just  
2 didn't think this was the appropriate time to do this kind of  
3 discovery because we are principally waiting to get the  
4 information from them. But once we have it, we are perfectly  
5 happy to show our cards.

6 THE COURT: Okay. That was sort of my takeaway, as  
7 well.

8 Any response or reaction from the Kingdom?

9 MR. KELLOGG: No, your Honor, as long as it does not  
10 delay the process too much. The plaintiffs' responded last  
11 night to our discovery request, and in it they said they would  
12 provide us copies of all materials that they obtained through  
13 third-party subpoenas, which I think it is appropriate for us  
14 to be able to see, as well, going to be important.

15 THE COURT: Okay. Good.

16 All right. As far as timing goes, I know we talked  
17 about motions being filed in October. I don't think that  
18 that's realistic, but I am looking to get motions or get this  
19 back to Judge Daniels hopefully by the end of this year or  
20 early next year. That time frame seems like a reasonable one  
21 for me, and I know there are other discovery motions that are  
22 pending before me. When this one comes in, I will prioritize  
23 it, given the sensitivity and the timeliness issues.

24 Any other issues with respect to the discovery that we  
25 should be discussing at this point?

1502TERC

1                   MR. KELLOGG: Your Honor, there is the issue of the  
2 third-party discovery which we raised, that the third-party  
3 subpoenas served on the State Department and the F.B.I. go well  
4 beyond the scope of discovery that Judge Daniels has ordered.  
5 I realize, your Honor, the question of whether we have standing  
6 to object, and I know a representative of the United States is  
7 here and presumably will be responding to that. But it does --  
8 they have already served, I believe, six or seven third-party  
9 subpoenas. So to the extent that they are expanding well  
10 beyond what Judge Daniels talked about in pages 19 to 23 and  
11 even seeking information about individuals that he expressly  
12 rejected the allegations concerning as insufficient, it  
13 significantly increases the burden on us and the potential for  
14 delay.

15                   THE COURT: How does it increase the burden on you?

16                   MR. KELLOGG: Because we have to monitor all this  
17 stuff as it comes in and take a look at it. To the extent that  
18 there are 30(b)(6) depositions and such, we are going to have  
19 to attend those.

20                   THE COURT: A couple of points. One, the Plaintiffs'  
21 Executive Committee is moving on multiple fronts, so it is  
22 possible -- I haven't canvased these subpoenas closely -- that  
23 there is information that's being sought that may speak to  
24 other elements of this much larger case.

25                   MR. KELLOGG: I think that's not the case, your Honor,

1502TERC

1 you will find if you read them.

2 THE COURT: Okay. And then my initial concern for you  
3 is whether or not the Kingdom has standing, and I don't see the  
4 argument. Your burden of having to review it seems slight in  
5 this instance and it hasn't -- I suppose if the State  
6 Department intends to make the same arguments that you are  
7 making, that Judge Daniels has not authorized this type of  
8 broad discovery, I think they are the ones who need to make  
9 that argument to me. I'm not sure that you really have the  
10 standing.

11 MR. KELLOGG: That's fair enough. Two points, your  
12 Honor:

13 One is that we would ask that the State Department,  
14 the Department of Justice, be made aware of the limitations  
15 that Judge Daniels has imposed upon the discovery so they can  
16 make their own judgment.

17 Second, we did cite the court a couple of opinions, I  
18 know one from Judge Cote and another from the Southern  
19 District, in which they note that the court has independent  
20 authority to say this third-party subpoena is going beyond the  
21 scope of proper discovery in this matter. So although we don't  
22 contemplate filing a motion to quash and your Honor has  
23 indicated you don't think we have jurisdiction, we just wanted  
24 to bring the issue to the attention of the court.

25 THE COURT: Okay. Thank you.

1502TERC

1                   Anything you would like to say in response?

2                   MR. CARTER: Your Honor, all I would say is that -- a  
3 few things. One, we are obviously in a conversation with the  
4 Department of Justice representing the agencies, and one of the  
5 things the Department of Justice wants to know is how is this  
6 relevant to an inquiry that's appropriately ongoing in the  
7 proceeding? So the agencies are well represented by the  
8 Department of Justice relative to the issues that Mr. Kellogg  
9 has raised. We are not of a view necessarily that discovery of  
10 the agencies is cabined in the same way discovery of the  
11 Kingdom is; but, even putting that aside, we firmly believe  
12 that the things we have asked for go straight to the heart of  
13 the discussion on pages 19 to 23, and it is up to us to  
14 convince the agencies and the Department of Justice that it's  
15 relevant, and we are going to go through that process.

16                   THE COURT: Can you represent to me that the agencies  
17 are aware of the posture that the court is in, meaning that  
18 Judge Daniels has issued this decision and authorized discovery  
19 as to these particular allegations?

20                   MR. CARTER: I can say that. Sarah Normand from the  
21 U.S. Attorney's office is here. I think she could probably  
22 affirm that she is very much aware of the posture of the  
23 litigation, having monitored it for many, many years.

24                   THE COURT: Okay. Ms. Normand, do you want to just  
25 step up? But I need to you to come borrow Mr. Carter's

1502TERC

1 microphone.

2 MS. NORMAND: Sarah Normand, from the U.S. Attorney's  
3 Office for the Southern District of New York. And we are  
4 representing both the Department of Justice and the State  
5 Department in relation to the subpoenas that have been issued  
6 as well as the *Touhy* requests that are accompanying those.7 As the court may be aware, each agency has a set of  
8 regulations that govern requests that are made to agencies when  
9 the agencies are nonparties, and those regulations differ among  
10 agencies and they outline various considerations that need to  
11 be taken into account in evaluating requests.12 And so the agencies involved in this case, the F.B.I.  
13 and the Department of Justice and the State Department, are  
14 reviewing the subpoenas. We have made an interim response to  
15 the Plaintiffs' Executive Committees that seeks more  
16 information with regard to the F.B.I. subpoena.17 With regard to the State Department subpoena, we are  
18 still reviewing that. We certainly will hear from the Kingdom  
19 of Saudi Arabia with regard to its objections to understand the  
20 basis for those.21 We have very much been following this. We are here  
22 today obviously, and we were here at the prior conference, as  
23 well, and we are asking for information about any applicable  
24 court orders that affect the scope of discovery with regard to  
25 these parties; but also, to the extent the plaintiffs are

1502TERC

1 seeking material that relates to other claims, if in fact they  
2 are seeking that material, we have asked them to identify the  
3 applicable parties' claims, court orders, etc., so we can make  
4 the relevant evaluations.

5 THE COURT: Excellent. Sounds like the U.S.  
6 government is well represented.

7 MS. NORMAND: Thank you, your Honor.

8 THE COURT: Thank you.

9 Let me move briefly to the request filed, I think it  
10 was yesterday regarding, the short-form complaint, and the  
11 like.

12 Let me ask you a really basic question. Yes? Are you  
13 going to be taking the lead here?

14 MR. MALONEY: I am, your Honor.

15 THE COURT: Thank you. It is Mr. Maloney?

16 MR. MALONEY: Yes. Andrew Maloney. Sorry.

17 THE COURT: My first question for you is one maybe I  
18 should know the answer to, but I will betray my ignorance in  
19 open court to all, what is the statute of limitations for the  
20 claims against Iran?

21 MR. MALONEY: Arguably, it's January 2, 2019.

22 THE COURT: Under JASTA because of the JASTA --

23 MR. MALONEY: Under the ATA, actually, which is the  
24 Antiterrorism Act, that JASTA helped to amend.

25 THE COURT: So under JASTA --

1502TERC

1 MR. MALONEY: It's JASTA and the ATA.

2 THE COURT: The ATA as amended by JASTA you believe  
3 allows claims brought by January --

4 MR. MALONEY: The ATA was actually amended before that  
5 on the statute of limitations. I believe it gave ten years.  
6 And then JASTA came along and added to that. But I don't think  
7 it -- it added some teeth to the ATA, but not on the statute of  
8 limitations, but that was done to --

9 THE COURT: So I confess that I didn't look it up  
10 again, but that was my recollection, that it was a ten-year  
11 statute of limitations going off of 1996.

12 MR. MALONEY: No, not 1996. 2009. You may be  
13 thinking of the prior FSIA, the Foreign Sovereign Immunities  
14 Act, that came out in 1996 that eventually helped us with the  
15 Libya action. But later, in 2009, the ATA was amended and  
16 expanded -- it started the clock, reset the clock for claims  
17 for another ten years from 2009.

18 THE COURT: Okay. And that amendment allowed for  
19 claims that -- it allowed the clock to run anew as of 2009 for  
20 an additional ten years?

21 MR. MALONEY: Yes.

22 THE COURT: It wasn't allowing a ten-year statute of  
23 limitations from the moment of the tort.

24 MR. MALONEY: Correct.

25 THE COURT: Okay.

1502TERC

1                   So like I said, I think I should at least give an  
2 opportunity for the Defendants' Executive Committee -- have you  
3 spoken to them about this at all?

4                   MR. MALONEY: I haven't spoken to them about the  
5 application we filed yesterday. We did run by them and got  
6 their essentially consent to the prior motion that we made to  
7 amend the complaints. If you recall, the last time we were in  
8 court, that was a pending motion that we dealt with that your  
9 Honor said, rather than amending, why don't you use the short  
10 form? It was a clerk docketing issue. And at the time, when  
11 the court suggested that and ultimately ruled that way, I did  
12 not realize, and perhaps the court did or didn't realize, that  
13 the existing order to adopt by a short-form complaint, adopt  
14 the existing complaints only specifically dealt with the CAC,  
15 the consolidated amended complaint, that was filed against the  
16 Kingdom of Saudi Arabia. Our motion that was under  
17 consideration at the time asked for amending any complaint in  
18 the MDL.

19                   We are interested in -- we are interested in filing  
20 new complaints against Saudi Arabia and also Iran. So the  
21 Defendants' Executive Committee doesn't represent either of  
22 those two defendants. Obviously Saudi Arabia is represented by  
23 counsel here in court today. Iran has never appeared, has  
24 defaulted. So those are the only two defendants that are  
25 affected by the application that we have made to be able to use

1502TERC

1 the short form to adopt existing complaints on those two  
2 defendants.

3 THE COURT: Okay. Let's talk about these claims  
4 differently. Obviously the claims against Saudi Arabia are, I  
5 think, different procedurally because of JASTA, whereas the  
6 claims against Iran, I guess the reason why we never issued an  
7 order regarding adding the claims is because we just assumed  
8 they were all there. So this is the first I am hearing that  
9 there are plaintiffs out there who have never sued Iran and who  
10 wish to now bring claims against Iran.

11 MR. MALONEY: That's correct, your Honor.

12 THE COURT: Do you have any sense of the volume of  
13 plaintiffs we are talking about?

14 MR. MALONEY: It is mainly solacium relatives of the  
15 decedents that were killed on 9/11. So that number starts with  
16 the number of decedents, but a number of them have already  
17 restated and gotten default judgment. So I don't know that the  
18 volume is huge, but for every death case you may have a handful  
19 of siblings or parents, so that expands -- it is one estate,  
20 but it expands it by the number of plaintiffs.

21 THE COURT: So you don't believe that there are  
22 decedents who have not brought claims, that there are estates  
23 that have not brought claims.

24 MR. MALONEY: That's true. The majority have, but  
25 there are a few hundred decedents' cases that have not been

1502TERC

1 filed. But this would also allow solacium for current and  
2 future amending or new complaints. We would actually identify  
3 the solacium family members in order that they get a default  
4 judgment hopefully and be able to participate in the Iran fund,  
5 which creates some time sensitivity because the Iran fund has  
6 been operating in phases. I know your Honor has signed off on  
7 some of those defaults.

8 That is the basis for the application, so that we get  
9 additional plaintiffs who are interested in suing Iran, they  
10 are going to have to serve, we are going to have to serve those  
11 complaints against Iran and get hopefully eventually a default  
12 that we can then use with the Iran fund.

13 THE COURT: Okay. Just so I understand what's coming,  
14 you believe that there are a few hundred estates that have not  
15 yet sued Iran.

16 MR. MALONEY: Correct.

17 THE COURT: And then for each estate there is half a  
18 dozen solacium claims related?

19 MR. MALONEY: Correct, your Honor.

20 THE COURT: Okay.

21 MR. MALONEY: Phase one for the Iran fund, so your  
22 Honor knows, closes out September 14. So that's why it is time  
23 sensitive. We had intended to get this before your Honor  
24 sooner, but when we realized as a result of your Honor's ruling  
25 on using the short form there was no procedural process for us

1502TERC

1 to do this in the way that we are seeking to do it now, rather  
2 than starting all over again and translating a brand new  
3 complaint, we wanted to be able to adopt the existing  
4 complaints using the short form, translate that, and have that  
5 served.

6 THE COURT: So Exhibit A to your letter is the Iran  
7 short form complaint, which appears to adopt the Ashton and  
8 Burnett Iran complaints.

9 MR. MALONEY: Well, it gives you the option to adopt  
10 either one of those. But, yes, we are not seeking to start all  
11 over again. The new plaintiffs would adopt one of the existing  
12 complaints and have to be subject to all of the prior rulings.  
13 They would also have to serve, if they have not been a  
14 plaintiff before suing Iran, they would have to serve those  
15 complaints, just like the prior complaints --

16 THE COURT: So they would serve a short-form complaint  
17 and the underlying complaint?

18 MR. MALONEY: Yes. Well, we would prefer just to be  
19 able to serve the short form. The underlying complaint is  
20 already -- we could attach that. It's been translated. It's  
21 been served multiple times against Iran.

22 THE COURT: Okay. I have spoken extensively with our  
23 Clerk of Court about this case and our MDL clerk, a person I  
24 assume you all are familiar with. They are flooded by this  
25 case. It is absolutely overwhelming the Clerk's Office. I

1502TERC

1 have an obligation and a desire to facilitate their work over  
2 your work, to be candid. Their preference, I think, is going  
3 to be to file one new case per decedent. So if you are telling  
4 me there are 300 new decedents, they are going to want 300 new  
5 complaints.

6 MR. MALONEY: If that's what the court orders, we will  
7 do that. I think that will probably make it more difficult for  
8 them, rather than easier. If you had, say, 300 on one  
9 complaint, you have one complaint, like we have had for Ashton,  
10 for example. I'm not sure how that facilitates efficiency for  
11 the Clerk's Office. But if that's what your Honor prefers or  
12 the clerks prefer, we could do it that way. It seems to be the  
13 opposite, but --

14 THE COURT: Having these cases with 300 people or  
15 more --

16 MR. MALONEY: We would have to serve each of those  
17 complaints individually, as well. That creates more  
18 logistical, more costly for the plaintiffs. It just seems to  
19 me to be inefficient but. . .

20 THE COURT: I don't know more it would be more costly.  
21 You can either serve one envelope or you can serve 300  
22 envelopes.

23 MR. MALONEY: The State Department charges a fee for  
24 each complaint, I think \$2,000 to serve each one. That is  
25 multiplied by something like 300 right there.

1502TERC

1 THE COURT: I thought our filing fee was expensive.

2 MR. MALONEY: Sorry?

3 THE COURT: I said and I thought our filing fee was  
4 expensive.

5 Okay. I will take that under consideration.

6 The second application is adding to the Ashton  
7 complaint, and so I understand this as being very similar to  
8 what we agreed to previously, only clients of, I think, the  
9 Kreindler firm wish to join the Kreindler firm complaint, which  
10 is the Ashton complaint.

11 MR. MALONEY: Correct, your Honor.

12 THE COURT: So this is the same thing we agreed to  
13 previously, except instead of going to the consolidated amended  
14 complaint, it's to the Ashton complaint.

15 MR. MALONEY: Correct, your Honor.

16 THE COURT: Same question. Do you have any sense of  
17 the volume of new cases we are talking about here?

18 MR. MALONEY: As I indicated at the last conference,  
19 they would include personal injury cases, and there are a few  
20 thousand of those.

21 THE COURT: Do we think all of the Kreindler client  
22 death cases are in at this point?

23 MR. MALONEY: Yes, your Honor. In fact, new death  
24 cases are now essentially being -- now essentially retaining  
25 the entire committee, at least on the personal injury and death

1502TERC

1 side. So Mr. Goldman, from Anderson Kill, has been handling  
2 the new decedent cases that have been coming in since the fall  
3 of 2016. So we are not -- the Kreindler firm, the Ashton case,  
4 is not taking on new death cases. That's not what we are  
5 seeking to use the short form for. It will be personal injury  
6 and solacium.

7 (Counsel confer)

8 MR. MALONEY: I'm told we have about a dozen death  
9 cases that still haven't been added to the Ashton case before  
10 the time where we decided to have new estates retain the  
11 Plaintiffs' Executive Committee.

12 THE COURT: All right.

13 Mr. Kellogg, anything you would like to say about any  
14 of this?

15 MR. KELLOGG: No.

16 THE COURT: All right.

17 MR. KELLOGG: I haven't studied it, but I doubt we  
18 will have any objection.

19 THE COURT: My sense is that what's being proposed for  
20 your client is a very similar form to what we have already got  
21 in place for the consolidated amended complaints, but we have a  
22 second complaint in that case, the Ashton complaint, so this is  
23 for Ashton clients to just join that one. So I don't see an  
24 issue with that.

25 Okay. I will turn to this right away. I know there

1502TERC

1 is time sensitivity here.

2 Let me just reminded you, if you want judgments by  
3 September 14, I will share with you that I take a vacation in  
4 August and Judge Daniels might as well and so --

5 MR. MALONEY: We understand, your Honor.

6 THE COURT: Okay. I will issue at least two orders  
7 from this conference, one on this last issue we are talking  
8 about about the short forms, and the second one will be on a  
9 schedule for any motions to compel discovery on the  
10 jurisdictional issue.

11 I really do want the parties to continue doing their  
12 best to meet and confer and reach agreement. I know you have  
13 done that in large part. Hopefully, the discovery that you  
14 received, Mr. Carter, will help you make better arguments to  
15 Mr. Kellogg; and Mr. Kellogg, hopefully you will be  
16 accommodating where appropriate so the parties can get this  
17 phase of the litigation completed and get back to Judge Daniels  
18 on the new motions.

19 Anything further from either side?

20 MR. CARTER: No, your Honor.

21 MR. KELLOGG: No, your Honor.

22 THE COURT: Thank you, everybody. Happy holiday.

23 COUNSEL: Thank you, your Honor.

24 oOo  
25